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IN THE
Supreme Court of the United States
OCTOBER TERM 1977

No. 77-1157

TOPPS CHEWING, INC., *Petitioner,*

v.

FLEER CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**PETITIONER'S REPLY TO RESPONDENT'S
BRIEF IN OPPOSITION**

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ARGUMENT

The major thrust of the Brief in Opposition filed by the respondent Fleer Corporation ("Fleer") lies in its blanket assertion that the denial of a motion for summary judgment never constitutes a final decision and therefore, cannot be appealed under 28 U.S.C. § 1291. Evidently uncomfortable with total reliance upon this argument, Fleer sets forth a second even weaker contention, namely, that the reasoning and principles which underly this Court's decision in *Ab-*

*ney v. United States*¹ are inapplicable to the instant case, because, unlike *Abney*, no constitutional guarantee is here at issue. These misconceived arguments stem from an inaccurate reading of the District Court's decisions in this case,² and a failure to comprehend the nature of the "collateral order" doctrine.

I. The District Court's Order Is Final and Appealable.

The denial of a motion for summary judgment is an appealable decision within the meaning of 28 U.S.C. § 1291, where the district court's order exhibits sufficient indicia of finality. *E.g.*, *McSurely v. McClellan*, 521 F.2d 1024, 1030-35 (D.C. Cir. 1975), *modified on rehearing*, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. granted*, 98 S. Ct. 260 (1977); *Lody v. Secretary of Health, Education & Welfare*, 451 F.2d 871, 872 (9th Cir. 1971) (per curiam); *Gardner v. Moon*, 360 F.2d 556, 558 & n.2 (8th Cir. 1966); *see Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 n.1 (2d Cir. 1971) (per curiam).³ When the essence of a party's claim is that substantial rights will be irretrievably lost if it is forced to proceed to trial, the denial of that claim at the summary judgment stage constitutes a final decision. *McSurely v. McClellan*, *supra* at 1031; *see Abney v. United States*, *supra* at 660-62.

¹ 431 U.S. 651 (1977).

² The District Court's decisions denying petitioner's motion for summary judgment and refusing reconsideration of that denial may be found in the back of Topps' Petition for a Writ of Certiorari (Appendix B and Appendix C, respectively).

³ The treatise authors cited at page 5 of Fleer's Brief in Opposition also recognize that the denial of a summary judgment motion may, in the proper circumstances, constitute a final, appealable decision under 28 U.S.C. § 1291. *See* 6 *Moore's Federal Practice* ¶ 56.22, at 30 (1977-78 Supplement); 10 *Wright and Miller, Federal Practice and Procedure*, § 2715, at 424-26 & n.72 (1973).

At the core of Topps' collateral estoppel defense is its insistence that, having endured a costly and time-consuming legal proceeding in which the respondent had a fair opportunity to participate, petitioner should not again be forced to suffer the vexation and expense necessary to defend allegations resolved in the prior litigation. If the validity of this defense is not correctly adjudicated and subjected to appellate review prior to trial, Topps' right to be free from the hardships imposed by repetitive litigation will be permanently and irretrievably lost.

The respondent contends, however, that this right should be sacrificed in those cases where the denial of summary judgment is solely based upon a failure of proof. Whatever validity such an assertion may have in another context, it is completely inapplicable to the present case. As the District Court recognized in its decision denying reconsideration of petitioner's motion for summary judgment,⁴ the major issue before the court was not the sufficiency of the evidence, but rather the legal standard to be employed in determining whether the doctrine of collateral estoppel should apply. The District Court held that the application of the doctrine depends upon the control exerted by the respondent over the prior litigation, while Topps maintained that the proper test is whether Fleer had previously had a full and fair opportunity to present its

⁴ *See* Appendix C of Topps' Petition for a Writ of Certiorari.

claim.⁸ Thus, the decision in the lower court was based upon an assertedly erroneous determination of law, not of fact, and was therefore, ripe for review at the summary judgment stage. The postponement of appellate review on this issue would force the petitioner to submit to another lengthy and expensive trial on issues which have previously been resolved in its favor and would thereby undermine the protection afforded by the collateral estoppel doctrine. Such delay of appellate review would be tantamount to its denial.

II. The Application of the "Collateral Order" Doctrine to the Instant Case Is Required Under Prior Decisions of This Court.

As its fall-back argument, Fleer also asserts that the principles enunciated in *Abney v. United States*, *supra*, are inapplicable here because the decision in *Abney* was predicated solely on a constitutional basis. This assertion is refuted by the *Abney* opinion itself. In holding that the denial of a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, this Court relied, not upon the constitutional underpinnings of double jeopardy, but rather upon the "collateral order" doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). That case involved a corporate defendant's claim that it should not be

⁸ See *Scooper Dooper v. Kraftco*, 494 F.2d 840, 844 (3d Cir. 1974). The petitioner's assertion that proof of control is not a necessary element of the collateral estoppel defense when the first case was litigated by a governmental entity on behalf of the public interest, is also supported by the recent decision of the Court of Appeals for the Fifth Circuit in *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84, 97-101 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3216 (Oct. 4, 1977).

forced to face trial unless the plaintiff first posted security for the costs of the litigation. No constitutional right was at issue and yet, this Court held that the denial of the defendant's motion for such security was immediately appealable under 28 U.S.C. § 1291.

The common thread which runs through the claims asserted in *Abney* and *Cohen* is also present in this case. In all three the same assertion is made: Substantial rights will be lost if petitioner is required to proceed to trial. It is not the origin of these rights which is critical to the application of the collateral order doctrine, but rather their importance to the administration of justice. Viewed in this manner, the interests protected by collateral estoppel—a doctrine which this Court has termed a "rule of fundamental and substantial justice"⁹—should not be sacrificed by delaying appellate review.

⁹ *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.⁷

Respectfully submitted,

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⁷ Petitioner also wishes to inform this Court that *Samuel v. University of Pittsburgh*, 506 F.2d 355 (3d Cir. 1974), was erroneously cited in footnote 5 on page 8 of Topps' petition and should therefore be omitted.